SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-20

ROGER B. JACOBS

Petitioner

versus

CARL R. GROMATSKY, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CRAIG R. NELSON of
HAMMETT, LEAKE AND HAMMETT
1024 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: 581-2121

Counsel for Petitioner

I N D E X

	Page
Citations ----------	i
Opinions Below ----------	1
Jurisdiction ----------	2
Questions Presented ----------	2
Statutes Involved ----------	3
Statement ----------	3
Reasons For Granting The Writ --------	11
Conclusion ----------	12
Proof of Service Affidavit ----------	13
Appendix ----------	14

CITATIONS - Page 1

CASES:	Page
Abney vs Campbell, 206 F.2d 836 (1953)	8
Acker vs Commissioner of Internal Revenue, 58 F.2d 568 (1958)	6
Erwin vs Cranquist, 253 F.2d 26 (1958)	8
Johnson vs Georgia Hwy. Express, 417 F.2d 1122 (1969)	10
Kahan vs Rosenstiel, 424 F2d 161 (1970)	10
Miller vs Market International, 452 F.2d 424 (1971)	10
Philadelphia Electric vs Anronda, 43 FRD 452	10
Polakoff vs Delaware Steeple Chase, 264 F.Supp 915 (1966)	10
Skye vs N. O. Saints, Inc., CA 72-2331 (6/29/73)	10
U.S. vs Certain Lands, 246 F.2d 823	6
U.S. vs Keig, 334 F.2d 823 (1964)	8
Wood vs C.I.R., 462 F.2d 691 (1972)	8

CITATIONS - Page 2

MISCELLANEOUS:	Page
Fifth Amendment, U.S.Constitution ---	3,8,9, 11
26 USCA 6015 ----------	3
26 USCA 6511 ----------	3,4
26 USCA 6513 ----------	3,4
26 USCA 2282 ----------	3,11
Internal Revenue Code - Sec. 7422 (a) ----------	3,9
Rule 23 FRCP ----------	3,10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

ROGER B. JACOBS

Petitioner

versus

CARL R. GROMATSKY, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 20, 1974.

OPINIONS BELOW

The Trial Court of the District Court for the Eastern District of Louisiana (New Orleans Division) granted defendants' Motion to Dismiss on December 5, 1973 without issuing an opinion. The opinion of the Court of

Appeals for the Fifth Circuit was rendered in Court of Appeal Case No. 74-1171 on May 20, 1974 and is not yet reported in the Federal Reporter.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on May 20, 1974, and a copy of it is appended to this Petition. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

During 1970 petitioner withheld from his wages a certain sum of money to be paid as federal income tax for 1970. When he filed his federal income tax return in April of 1971 he received a refund but no interest thereon. On September 12, 1972 petitioner requested a refund from the government in the amount of $19.20 representing the interest the government should have paid him on the refund from the time he paid his taxes to April 15, 1971, the time the government first acknowledged it had his money.

Such a refusal to pay petitioner interest on his money is a violation of that portion of the Fifth Amendment of the U.S. Constitution which prohibits the taking of a person's property unless he is given just compensation for it.

Petitioner further maintains his Complaint should be heard as a class action before a three judge court.

Thus, the questions presented are:

1. Whether the District Court erred,

as a matter of law, in refusing to grant petitioner's request for a three judge court;

2. Whether the District Court erred, as a matter of law, in failing to grant petitioner's request that this action be tried as a class action;

3. Whether the District Court erred, as a matter of law, in failing to declare unconstitutional those portions of the Internal Revenue Code pertaining to the Internal Revenue Service's collection of income taxes on a quarterly basis because it takes a taxpayer's money, before it acknowledges it has same, without giving him just compensation for it.

STATUTES INVOLVED

Fifth Amendment, U. S. Constitution
26 USCA 6015
26 USCA 6511
26 USCA 6513
26 USCA 2282
Internal Revenue Code - Sec. 7422 (a)
Rule 23 FRCP

STATEMENT

Petitioner filed suit attacking the constitutionality of several portions of the Internal Revenue Code (IRC) pertaining to the Internal Revenue Service's (IRS) collection of income taxes on a quarterly basis. The statutes attacked are:

26 USCA 6015
26 USCA 6511
26 USCA 6513

26 USCA 6015 states, inter alia, that every individual must make a declaration of

his estimated tax if his gross income can reasonably be expected to exceed a certain specified sum of money and pay it on a quarterly basis throughout the year.

26 USCA 6511 states, inter alia, that a claim for credit or refund of an overpayment of any tax imposed must be filed within a certain time period after a return is filed.

26 USCA 6513 states, inter alia, that for purposes of paragraph 6511 (i.e. in order to claim a refund) any tax withheld or paid as estimated income during the tax year "shall be deemed to have been paid . . . on the 15th day of the fourth month following the close of (the) taxable year" (i.e. April 15th).

Petitioner attacks these statutes because they are unconstitutional under the Fifth Amendment of the U. S. Constitution which states, inter alia, private property should not be taken for public use without just compensation and requests that respondents be enjoined from enforcing said statutes on these grounds.

To hear petitioner's Complaint there should be a three judge court convened and the matter should be considered a class action for all taxpayers who filed claims for refunds, received the refunds, and were not paid interest on their refund for the length of time the government had their money.

In response to petitioner's Complaint respondents claimed that it failed to state a claim upon which relief could be granted. With respect to the class action request the respondents further claimed that there is no jurisdiction because the withholding

provisions of the IRC are not unconstitutional and that all parties to the class action have not filed claims for refunds.

In response to the government's claim that all parties to the class action have not filed refund claims, petitioner filed several interrogatories requesting information as to which U. S. taxpayers filed claims for refunds over the past several years. Respondents objected to these interrogatories but agreed to stipulate that in 1970, and in the other years mentioned in the interrogatories, that taxpayers other than petitioner filed income tax returns seeking refunds of taxes paid and did not seek any refunds for interest due as petitioner has requested. This stipulation did not alleviate the burden of the Government to answer the interrogatories and petitioner's Motion to Compel Answers was to be heard by the Court on December 5, 1973. A copy of the letter to counsel for respondents confirming this stipulation is dated August 31, 1973 was attached to petitioner's Brief in the District Court.

CONSTITUTIONAL ISSUE. Under the statutes petitioner attacks all earners of income in the United States who have additional income in excess of their wages or who are not subject to withholding statutes must make a declaration and tax payments four times each calendar year. If these payments are in excess of the taxpayer's tax liability he gets a refund but not until April 15th passes. Interest (from April 15th) is paid on this refund but only if 45 days from April 15th of the following tax year goes by without the IRS paying the refund.

Petitioner attacks these statutes because the government forces you to give up

your money, uses it as long as 13 1/2 months without paying you any compensation for it, and states it really does not have this money it is spending until April 15th of the following year!

Petitioner's demand is for 6% interest on the refund he applied for and received for the tax year 1970. Petitioner also maintains he should receive interest from the date he was forced to pay his estimated taxes, not from April 15th, which the government denies it has as per U. S. vs Certain Lands.

The jurisprudential tests a three judge court must apply in this case in determining the constitutionality issues herein as set down by the United States Supreme Court in Acker vs Commissioner of Internal Revenue. For this Court's convenience the pertinent part of this opinion is set forth below:

> "While holding that the courts may not disturb the judgment of the Congress because of indirect effects of a statute that clearly represents an exercise of the taxing power (see, for example, McCray vs United States, 1904, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78) on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing might not be a taxing statute at all, but one which on its face has crossed "tax" to the classification "taking", so as to become subject to the limitations of the Fifth Amendment to the Constitution. (Steward Machine Co. vs Davis, 1937, 301 U.S. 548, 585, 57 S.Ct. 883, 81 L.Ed. 1279; Brushaber vs Union Pacific R., 1916, 240 U.S. 1, 24, 36 S.Ct. 236, 60 L.Ed. 493).

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking" rather than the area of "taxing", and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in Brushaber vs Union Pacific R., supra, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, where he pointed out that, despite the bredth of the taxing power conferred by the Constitution, there might arise "a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion". (240 U.S. at pages 24-25, 36 S.Ct. at page 244).

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in Steward Machine Co. vs Davis, supra, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, when he wrote: "(W)e assume that

> discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." (301 U.S. at page 585, 57 S.Ct. at page 890). Nor do we forget the ringing words of Mr. Justice Homes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits". (Panhandle Oil Co. vs State of Mississippi ex rel. Know, 1928, 277 U.S. 218, 48 S.Ct. 451, 453, 72 L.Ed. 857)".

Although a U. S. Court has held that quarterly declarations and withholding taxes are constitutional and constitute an orderly and proper method of collecting revenues, this form of collection has also been classified as a convenience for the government. Erwin vs Cranquist. Petitioner submits, if this is so, why cannot the government pay for the convenience by simply allowing each taxpayer to compute six percent interest on the quarterly payment they make and deduct same from their tax due (if any) each April 15 when filing his return. If, on the other hand, refund is due, just add the interest on and remit to the taxpayer.

In summing up on this issue, the government's failure to permit interest to be paid on the money collected throughout the year is so arbitrary that it amounts to a "taking" of property in violation of the Constitution's Fifth Amendment. Abney vs Campbell; U. S. vs Keig; Wood vs C.I.R.

All government could cite in support of its position that petitioner has no cause of action was a 1916 Supreme Court decision which states when Congress passes taxing laws

it does so free of the limitations of the Fifth Amendment's "due process" clause. If this case has any validity then it is totally illogical for the government to simply assume that petitioner has no cause of action as nothing was cited to the lower court to state that Congress is immune from the "taking without compensation" provision of the Fifth Amendment. Petitioner submits no court could ever so hold as the only reason Congress can tax is because of the Constitution! Furthermore, the government has not shown its refusal to pay petitioner interest does not amount to an arbitrary taking of his property.

CLASS ACTION ISSUE. Respondents claim Section 7422 (a) of the IRC requires all members of a class file a claim for refund before a class action is permitted and cite the case of Heisler vs United States in support of this position. This is a very weak argument as the Heisler case simply dealt with one individual trying to claim a depletion allowance for his body and mind. Petitioner's position is that section 7422 does not say class actions require all people to file claims for interest due on refunds as petitioner has done in this case.

If the government's logic was accepted by this Court, it would mean, for instance, in a class action discrimination suit, all blacks must have been discriminated against. Needless to say, such a precedent cannot be commenced at this time as it would defeat the theory of a class action lawsuit.

In the event this Court feels all persons who have claimed refunds must be a member of the class petitioner seeks to represent then it should compel respondents to answer petitioner's interrogatories so he can include all proper parties in this

lawsuit and order a trial on the merits.

This request for a class action has been filed under amended Rule 23 of the Federal Rules of Civil Procedure. Judge Rubin of the United States District Court for the Eastern District pointed out recently this rule significantly expands the scope of class actions. He said such a suit is a very flexible procedural device and a District Court judge no longer is hampered by the traditional classifications but is given a large measure of discretion in balancing conflicting interests and adopting procedures that are fair, reasonable and effective. Skye vs New Orleans Saints, Inc. In this case Judge Rubin allowed one individual to represent all of the New Orleans Saints season ticket holders without requiring him to name all others in the lawsuit as the government would probably suggest in this suit.

The fact that the burden of proof is on petitioner to establish his right to maintain a class action does not mean that he must prove his entire case before the preliminary class action determination can be made. Miller vs Market International, Inc.; Philadelphia Electric Co. vs Anconda; Polakoff vs Delaware Steeple Chase. Furthermore, the determination of whether there is a proper class action does not depend upon the existence of a cause of action. Kahan vs Rosentiel; Johnson vs Georgia Hwy. Express.

Based upon the foregoing petitioner submits a class action should be allowed in this case.

THREE JUDGE COURT ISSUE. This suit seeks, inter alia, relief for a permanent injunction restraining the enforcement of

any act of Congress which is repugnant to the constitution of the United States. Authority for petitioner to file a request for a three judge court is found in 28 USC 2282. Petitioner's amended complaint filed on August 6, 1973, which incidently respondents did not have the courtesy to answer, requested such a permanent injunction of a congressional statute and therefore all matters in this case must be decided by a three judge court.

Respondents' argument that injunctive relief cannot be obtained by petitioner because he wants to enjoin collection of taxes is completely without merit. All petitioner wants to do is obtain a $19.20 interest payment on his refund and have subject statutes declared unconstitutional. No claims whatsoever are made to enjoin collection of any taxes or the government's right to collect taxes.

REASONS FOR GRANTING THE WRIT

Based upon the foregoing petitioner feels he has sufficient reasons in law to have declared unconstitutional those portions of the Internal Revenue Code which pertain to the Internal Revenue Service's collection of income taxes on a quarterly basis. Petitioner should also be allowed to bring this suit as a class action before a three judge court. Petitioner does not seek to prohibit the collection of taxes. All he desires to do is challenge the government's failure to pay interest on the taxes he pays throughout the year on the grounds such failure is so arbitrary that it amounts to a "taking" of property in violation of the U. S. Constitution's Fifth Amendment.

Furthermore, because these issues have never been presented to this Court before, a review of same would be a most appropriate exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CRAIG R. NELSON of
HAMMETT, LEAKE AND HAMMETT
1024 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: 581-2121

PROOF OF SERVICE AFFIDAVIT

I, Craig R. Nelson, attorney of record for Roger B. Jacobs, petitioner herein, depose and say that on July 1974 I served a copy of the foregoing Petition for Writ of Certiorari on the Solicitor General, Department of Justice, Washington, D. C. 20530 by placing same in the U. S. Mail.

CRAIG R. NELSON of
HAMMETT, LEAKE AND HAMMETT
1024 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: 581-2121

Sworn and subscribed to
before me at New Orleans,
Louisiana this day
of July, 1974.

Notary Public

3993

Roger B. JACOBS et al., Plaintiffs-Appellants,

v.

Carl R. GROMATSKY, District Director, Internal Revenue Service, Defendant-Appellee.

No. 74-1171
Summary Calendar *

United States Court of Appeals,
Fifth Circuit.

May 20, 1974.

Taxpayers sought to establish unconstitutionality of internal revenue statutes relating to withholding of taxes and quarterly declarations of estimated income tax. The United States District Court for the Eastern District of Louisiana at New Orleans, Herbert W. Christenberry, J., refused to convene a three-judge court or to determine the right to maintain the action as a class action. Plaintiffs appealed. The Court of Appeals held that congressional power to lay and collect taxes on incomes, under the Sixteenth Amendment, includes prescribing basic rates of taxation, time and manner in which taxes are to be paid and also means and methods for making refunds, with or without interest, and failure of the tax statutes to provide for interest on funds collected in connection with withholding and quarterly declarations is not taking of property in violation of the Fifth Amendment.

Affirmed.

1. Internal Revenue ⇐10

Congressional power to lay and collect taxes on incomes, under Sixteenth Amendment, includes prescribing basic rates

* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y. et al., 5th Cir. 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

of taxation, time and manner in which taxes are to be paid and also means and methods for making refunds, with or without interest. 26 U.S.C.A. (I.R.C.1954) §§ 6015, 6511, 6513; U.S.C.A.Const. Amends. 5, 16.

2. Constitutional Law ⇐286
Internal Revenue ⇐38

In view of congressional power under Sixteenth Amendment to lay and collect taxes on incomes, failure of tax statutes to provide for interest on funds collected in connection with withholding and quarterly declarations is not taking of property in violation of Fifth Amendment. 26 U.S.C.A. (I.R.C.1954) §§ 6015, 6511, 6513; U.S.C.A.Const. Amends. 5, 16.

3. Courts ⇐101.5(7)
Federal Civil Procedure ⇐161

Where plaintiffs' basic claim for injunctive relief against enforcement of congressional act was clearly without merit, court did not err in refusing to request convening three-judge tribunal or in declining to determine right to maintain class action. 28 U.S.C.A. §§ 2282, 2284; Fed.Rules Civ.Proc. rule 23.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

The basic claim advanced by appellant is that the tax collection scheme embodied in certain sections of the Internal Revenue Code [*i. e.*, 26 U.S.C. §§ 6015, 6511 & 6513] relating to withholding taxes and quarterly declarations of estimated income tax is unconstitutional because of its failure to provide for the payment of interest on all amounts of such withholding and estimated tax payments which are later refunded as overpayments. As adjuncts of this claim, he asserts that the

court below erred in refusing to request the convening of a three-judge court pursuant to 28 U.S.C. §§ 2282 & 2284 and to determine appellants' right to maintain this action as a class action under Fed.R.Civ.P. 23 with provisions for allotment of costs and attorneys' fees from any recovered "fund." This court has previously denied injunctive relief pending the disposition of this appeal.

[1, 2] Appellant, while not directly contesting the validity of withholding and quarterly declarations as a means of collecting taxes, insists that the government must pay for the privilege of using its citizens' funds. Consequently, he contends that the failure of these tax statutes to provide for such interest makes them so arbitrary as to amount to a taking of property—a substantive violation of the fifth amendment. The government replies by pointing out that appellant cannot claim entitlement to interest because interest does not run against the government in the absence of an express contractual or statutory provision. However, this autocratic response begs the constitutional issue. The complete answer lies instead in the powers vested in the Congress to lay and collect taxes on incomes, under the sixteenth amendment. This power not only includes prescribing the basic rates of taxation, the time and manner in which taxes are to be paid; but also includes the means and methods for making refunds—with or without interest, which must be viewed realistically as no more than one function of the overall rate of such exaction.

[3] Since appellants' basic claim is clearly without merit, the court below did not err in declining to request the convening of a three-judge tribunal. Of course, the failure of the entire claim moots the class action issue.

Affirmed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROGER B. JACOBS and
BARBARA A. JACOBS

VS.

CARL R. GROMATSKY, District
Director, Internal Revenue
Service

SECTION "A"

No. 73-728

CIVIL ACTION

JUDGMENT

The Court having on December 5, 1973, granted the motion of the defendant to dismiss,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant Carl R. Gromatsky, District Director, Internal Revenue Service, and against the plaintiffs Roger B. Jacobs and Barbara A. Jacobs, dismissing said plaintiffs' suit at their costs.

Dated at New Orleans, Louisiana, this 7th day of December, 1973.

BENJAMIN W. REISCH, CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

Craig R. Nelson, Esq.

William W. Guild, Esq.

Ms. Michaelle F. Pitard

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-20

ROGER B. JACOBS, PETITIONER

v.

CARL R. GROMATSKY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The Internal Revenue Code of 1954 prescribes two basic methods for the collection of income taxes: (1) the quarterly payment of estimated taxes (Sections 6015(a) and 6153(a)(1)) and (2) the withholding of taxes from wages of an employee (Sections 3401-3404). Under either method, Section 6513(b) deems the tax to have been paid on the date prescribed for filing the return. No interest is paid on any resulting overpayment if the overpayment is refunded within 45 days from the later of either the date the return was filed or the date the return should have been filed. Section 6611(e).

Petitioner challenges the constitutionality of these methods of collecting income taxes.[1] Specifically, peti-

---

[1]It is unclear what collection method was applicable to petitioner. While the beginning of the petition refers to taxes "withheld from his wages" (Pet. 2), the latter portion (Pet. 3-4) refers to the statutory provisions regarding estimated payments.

tioner complains that the prohibition against interest on taxes violates the Fifth Amendment. He alleges that he made payments in excess of the tax determined to be due and that the overpayment was refunded within 45 days without interest. Contending that the statutory interest limitation violates the Fifth Amendment, petitioner brought this suit to recover $19.20, the amount of interest allegedly due. Petitioner also sought a declaration by a three-judge court that the statutory system for collection of taxes violated the Fifth Amendment and sought interest for all taxpayers who had similarly overpaid (R. 1-3).[2] The district court dismissed the complaint (Pet. App. 17) and the court of appeals affirmed (Pet. App. 14-16).

Quite apart from the prohibition contained in 28 U.S.C. 2201 against declaratory judgments in actions involving taxes, petitioner's constitutional claim is contrary to this Court's longstanding and consistent holdings that in cases other than eminent domain, the term "just compensation" in the Fifth Amendment does not necessarily include interest. Whether interest is allowable against the United States depends upon specific statutory or contractual provisions. Absent such a provision allowing the interest claimed in this case, there is no constitutional support for petitioner's claim. *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654, 658-659. Cf. *United States* v. *Hotel Co.*, 329 U.S. 585, 589-590; *Albrecht* v. *United States*, 329 U.S. 599.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

---

[2] "R." references are to the separately bound record appendix filed with the court of appeals.